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IN THE
INDIANA COURT OF APPEALS

CASE NO.: 22A-CT-01897

CHRISTINE COSME and ROY COSME Appellants-Plaintiffs v. DEBORA A. WARFIELD CLARK, DAN CHURILLA d/b/a CHURILLA INSURANCE, and ERIE INSURANCE Appellees-Defendants	) APPEAL FROM THE) LAKE SUPERIOR COURT NO. 2))))) TRIAL COURT CASE NO.) 45D01-1803-CT-00039))) THE HONORAL JUDGE) JOHN M. SEDIA

BRIEF OF *AMICUS CURIAE*, DEFENSE TRIAL COUNSEL OF INDIANA, IN SUPPORT OF APPELLEES (DEFENDANTS BELOW) AND IN PRESERVING THE EXISTING *PURCELL* STANDARD

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I. STATEMENT OF INTEREST

Defense Trial Counsel of Indiana ("DTCI") is an association of Indiana lawyers that defend clients in civil litigation. DTCI has an interest in the outcome of this appeal inasmuch as the Court's determination regarding the appropriate trial and appellate standards of review for motions for judgment on the evidence under Indiana Trial Rule 50(A) will have a substantial impact upon trials, motions practice, and appeals in this state and will affect how defense counsel advise clients regarding the same.[1]

II. SUMMARY OF ARGUMENT

On October 12, 2023, this Court invited amicus curiae briefing on the question of whether the Indiana Supreme Court should clarify or modify the legal framework articulated in *Purcell v. Old Nat'l Bank*, 972 N.E.2d 835 (Ind. 2012), as such framework relates to (a) the standard a trial court should apply when deciding whether to grant a Trial Rule 50(A) motion; and (b) the standard of review an appellate court should apply when reviewing the trial court's decision to grant or deny a Trial Rule 50(A) motion.

[1] Pursuant to Indiana Appellate Rule 46(E)(2), the undersigned counsel for Amicus have consulted with counsel for Appellees-Defendants—whose position Amicus supports—and reviewed the arguments raised in the Transfer Response Briefs, in an effort to avoid, where possible, any repetition and restatement of legal arguments.

As discussed more thoroughly below, this Court should reaffirm the *Purcell* standard because it has provided consistency and predictability to Indiana practitioners and citizens for more than a decade and it comports with the purpose and rationale behind the Indiana Supreme Court's adoption of Indiana Trial Rule 50(A). That rule is fundamentally different from other *pre-trial* dispositive motion rules (as well as rules in other jurisdictions) and requires the trial court's consideration of whether all or some of the issues tried before a jury (or an advisory jury) are supported by "sufficient evidence." Ind. T.R. 50(A). This "sufficient evidence" test involves a discretionary determination by the trial court—even though such court does not weigh evidence or judge witness credibility (unless there is a wholesale failure of credibility)—because the lower court is in a better position than an appellate tribunal to evaluate the factual context surrounding the issue or issues involved.

In the Rule 50(A) context, the trial court is not merely ruling upon a "paper record" but is, instead, conducting a jury trial where the non-moving party has had its day in court and has rested its evidence. The quantitative-qualitative test enunciated in *Purcell* is the proper standard to govern the trial court's evaluation of "sufficient evidence."

Meanwhile, the appropriate appellate standard of review is abuse of discretion, determining whether the trial court acted within its discretion in conducting the quantitative-qualitative analysis. That is the standard that Indiana appellate

courts have employed many years. This Court should reaffirm the *Purcell* standard controlling trial and appellate decisions on Rule 50(A) motions for judgment on the evidence.

III. ARGUMENT

Defense Trial Counsel of Indiana's focus as amicus is limited to the issue of the appropriate trial and appellate standards governing Trial Rule 50(A) motions for judgment on the evidence.

III.A. The Purcell Trial Standard: Quantitative-Qualitative Two Pronged Test

As background, the purpose of a Rule 50 motion for judgment on the evidence—which is made, at the earliest, after the close of the plaintiff's case-in-chief—is to test the sufficiency of the evidence supporting some or all of an opponent's claims or defenses. *See Hitachi Constr. Mach. Co., Ltd. v. AMAX Coal Co.*, 737 N.E.2d 460, 462 (Ind. Ct. App. 2000), *reh'g denied*, *trans. denied*.

Indiana Trial Rule 50(A) provides, in pertinent part:

> Where all or some of the issues in a case tried before a jury or an advisory jury are not supported by *sufficient* evidence or a verdict thereon is clearly erroneous as contrary to the evidence because the evidence is insufficient to support it, the court shall withdraw such issues from the jury and enter judgment thereon or shall enter judgment thereon notwithstanding a verdict.

Id. (emphasis added).

Critically, the relevant inquiry for a Rule 50(A) analysis is whether the issues are supported by *sufficient* (as opposed to just *any*) evidence. This "sufficient" qualifier separates Rule 50(A) motions from other dispositive motions including Rule 56(C) motions for summary judgment (providing that summary judgment be "rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law") made prior to trial and prior to the opponent's presentation of its case-in-chief. Rule 50(A)'s requirement that the issue or issues be supported by "sufficient evidence" also distinguishes Indiana's rule governing motions for judgment on the evidence with its federal counterpart (Federal Rule of Civil Procedure 50(A)), the latter of which permits the district court to resolve an issue against a party upon a determination that "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Like in the summary-judgment arena, with the *Jarboe* and *Hughley* standard that differs from federal summary-judgment practice, Indiana has charted its own path with respect to motions for judgment on the evidence.

Indeed, and as aptly recognized by the *Purcell* Court, the Indiana determination of whether evidence is "sufficient" requires both a quantitative and qualitative analysis. *See Purcell,* 972 N.E.2d at 840. Quantitatively, evidence fails where there is none to support the conclusion, or if the supporting evidence is wholly absent. *See id.*; *see also Am. Optical Co. v. Weidenhamer*, 457 N.E.2d 181, 183-84 (Ind. 1983). If

some evidence exists, however, a court must then proceed to the qualitative analysis to determine whether the evidence is substantial (i.e., sufficient) enough to support a reasonable inference in favor of the non-moving party. *Purcell*, 972 N.E.2d at 840.

Qualitatively, evidence fails when it cannot be said, with reason, that the intended inference may logically be drawn therefrom. *Id.* According to the *Purcell* Court, this failure may occur either because of an absence of credibility of a witness or because the intended inference may not be drawn without undue speculation. *Id.* Although the use of terms such as "substantial" and "probative" are helpful in ascertaining the sufficiency of evidence under the qualitative test, ultimately that sufficiency analysis comes down to one word: "reasonable." *Id.*

Accordingly, to prevail on a motion for judgment on the evidence under Trial Rule 50(A), the movant must do more than present *some* evidence. Rather, the presented evidence must also be sufficient. *Cf.* § 2530 *Standard Distinguished From Other Procedures—Involuntary Dismissal and Judgment on Partial Findings*, 9B FED. PRAC. & PROC. CIV. § 2530 (3d ed.) (noting that, under Federal Rule 50(A), the courts are "limited to deciding whether there is evidence on which reasonable people could find for the party opposing the motion").

As previously mentioned, this Court's deliberate inclusion of the "sufficient evidence" requirement in Indiana's Rule 50(A) is what separates a motion for judgment on the evidence from other types of pre-trial dispositive motions, like summary judgments.

Unlike a motion for summary judgment under Indiana Trial Rule 56(C), which analyzes whether "the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law,", the Trial Rule 50(A) "sufficient evidence" test is not merely whether a conflict of evidence may exist but, rather, whether there exists probative evidence substantial enough to create a reasonable inference that the non-movant has met its burden. *Purcell*, 972 N.E.2d at 841. This difference is warranted (even necessary) because the plaintiff—at the Rule 50(A) stage of proceedings—has had full and fair opportunity to present its case at trial (i.e., to have its day in court) and, thus, the concerns existing at the pre-trial dispositive motion levels are no longer present. *See, e.g., Reeder v. Harper*, 788 N.E.2d 1236, 1240 (Ind. 2003) (recognizing that courts at the summary judgment juncture must carefully review a decision on a Rule 56(C) motion to ensure that a party was not improperly denied its day in court); *Estate of Shebel ex rel. Shebel v. Yaskawa Elec. Am., Inc.*, 713 N.E.2d 275, 277 (Ind. 1999).

III.B. Application of Distinction: Comparison of Indiana Trial Rules 50(A) and 56(C)

Again, it is this Court's inclusion of the phrase "sufficient evidence" in Indiana Trial Rule 50(A) that prompted and mandates the *Purcell* standard, which gives some discretion to trial courts under the qualitative analysis. The phrase's inclusion

in the rule also separates decisions on motions for judgment on the evidence from other trial court pre-trial summary dispositions.

Under Trial Rule 56(C), for example, a party may defeat the opponent's summary judgment motion simply by presenting some evidence (no matter how self-serving, perfunctory, or non-credible) that will require the trier of fact to resolve the parties' differing accounts of the truth. *Hughley v. State*, 15 N.E.3d 1000, 1004-05 (Ind. 2014); *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009) (citing *Gaboury v. Ireland Road Grace Brethren, Inc.,* 446 N.E.2d 1310, 1313 (Ind. 1983)). The designation of *any* evidence that creates a genuine issue of material fact for trial would clear that low bar.

The factual posture of *Hughley* is instructive. There, during a consensual search of the defendant's house, police officers observed apparent cocaine residue and other indicia of cocaine dealing in plain view on the kitchen table—leading to a search warrant and the discovery of 550 grams of cocaine, plus further evidence of dealing. *Hughley*, 15 N.E.3d at 1002. The officers arrested the defendant and a search incident to his arrest revealed $3,871 in cash, mostly in denominations of 20-dollar bills, in his front pocket. *Id.* At the time of his arrest, defendant's car (a 1977 red Buick) was parked in front of his house. *Id.* A jury eventually convicted the defendant of dealing cocaine and related offenses. *Id.*

Thereafter, the State filed civil proceedings seeking forfeiture of the defendant's cash and car, alleging that both were proceeds of (or were meant to be used to

facilitate) his dealing. *Id.* On summary judgment, the defendant—as the non-moving party—designated his own affidavit denying that the cash and car were connected to his dealing. *Id.* The perfunctory affidavit recited the defendant's competence to testify and then stated in full:

> 2. The U.S. currency seized from me during my arrest . is not the proceeds from criminal activity nor was it intended for a violation of any criminal statute. I did not intend to use that money for anything other [than] legal activities.
>
> 3. Likewise, my 1977 Buick was never used to transport controlled substances and it is not the proceeds from any unlawful activity.

Id. This self-serving affidavit, which requires the fact finder to resolve the conflicting accounts of the truth, was sufficient to defeat a Rule 56(C) motion for summary judgment. *Id.* at 1003-04.

In *Hughley*, this Court cautioned that summary judgment "is not a summary trial" and, further, is an inappropriate tool for the trial court to use "merely because the non-movant appears unlikely to prevail at trial." *Id.* (citing *Tucher v. Brothers Auto Salvage Yard, Inc.*, 564 N.E.2d 560, 564 (Ind. Ct. App. 1991), *trans. denied*); *see also LaCava v. LaCava*, 907 N.E.2d 154, 166 n.9 (Ind. Ct. App. 2009) (recognizing that the decedent's "claim should withstand summary judgment" despite counsel's concession that "he will be unlikely to prevail" at trial).

Indiana has implemented a higher summary judgment bar (as compared to federal summary judgment practice), which consciously errs on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting

meritorious claims. *Hughley*, 15 N.E.3d at 1004. Under that higher bar, defeating summary judgment only requires a genuine issue of material fact—but not necessarily a persuasive one. *Id.*

In applying this standard, *Hughley* noted that, under the relevant forfeiture statute, the State made its *prima facie* case for summary judgment by designating evidence that the $3,871 at issue was in the defendant's pocket when he was arrested. *Id.* (citing Ind. Code § 34-24-1-1(d)). This *prima facie* case, however, is only the beginning of the story—it merely shifts the burden to the defendant (as the non-movant) to raise a "genuine issue of material fact." *Hughley*, 15 N.E.3d at 1004; *see also Williams*, 914 N.E.2d at 761-62. The *Hughley* defendant designated an affidavit that specifically controverted the State's *prima facie* case, denying under oath that the cash or car were proceeds of or used in furtherance of drug crimes. *Hughley*, 15 N.E.3d at 1004.

This Court found the defendant's affidavit evidence to be sufficient, though minimally so, to raise a factual issue to be resolved at trial and, thus, to defeat the State's summary-judgment motion. *Id.* at 1004-05. The *Hughley* defendant's designated evidence clears the low bar of raising a "genuine" issue of material fact, as it requires a trier of fact to resolve the parties' different accounts of the truth. *Id.* The State's designations establish a *prima facie* case that the defendant's substantial cash was proceeds of or used for dealing. But the defendant's sworn testimony by affidavit is direct evidence to the contrary, and so the fact finder must

reconcile the credibility of those two accounts, making summary judgment inappropriate. *Id.*

Importantly, the *Hughley* Court acknowledged that the defendant may very well lose a credibility contest at trial because the State's circumstantial evidence is compelling. *Id.* at 1005. By contrast, the defendant's affidavit is self-serving and conspicuously silent on any alternative explanation for how—apart from dealing cocaine—he happened to be carrying nearly $4,000 in mostly $20 denominations. *Id.* Without some corroboration, his credibility will likely be dubious. *Id.* But summary judgment "may not be used as a substitute for trial in determining factual disputes," and it "is not appropriate merely because the non-movant appears unlikely to prevail at trial." *Id*. (*quoting Tucher*, 564 N.E.2d at 564).

Ultimately, even though the *Hughley* defendant's designated evidence was "rather thin," it was enough to preclude summary judgment for the State. *Id.* The *Hughley* Court acknowledged that sufficient safeguards (such as penalties for perjury, the fee shifting and/or contempt provision of Trial Rule 56(G), and the fact that the defendant's trial testimony may provide additional details to flesh out his cursory affidavit) are in place to balance the integrity of the summary judgment process against any concern "for not prematurely closing the courthouse doors to the non-moving party, without raising the non-movant's burden beyond what our precedent has long required." *Hughley*, 15 N.E.3d at 1005.

Indeed, even if courts believe that the summary judgment non-movant may lose the resulting credibility contest, summary judgment still must be denied because a Trial Rule 56 proceeding "may not be used as a substitute for trial in determining factual disputes." *Id.* (citing *Clipp v. Weaver,* 451 N.E.2d 1092, 1093 (Ind. 1983)). Summary disposition is not appropriate just because the non-movant appears unlikely to prevail at trial. *Hughley*, 15 N.E3d at 1004-05.

In stark contrast, however, the purpose of an Indiana Trial Rule 50(A) motion for judgment on the evidence is to test the sufficiency of the evidence presented at trial (i.e., the watershed moment in a case) by the non-moving party. *Stewart v. Alunday*, 53 N.E.3d 562, 568 (Ind. Ct. App. 2016) (citing *Purcell*, 972 N.E.2d at 839). Under the sufficiency test of Trial Rule 50(A), the trial court must determine whether there exists *probative* evidence, *substantial ("sufficient") enough* to create a reasonable inference that the non-movant has met its burden. *See, e.g.*, *Ross v. Lowe*, 619 N.E.2d 911, 914 (Ind. 1993) (observing that if there is "any probative evidence or reasonable inference to be drawn from the evidence in favor of the plaintiff or if there is evidence allowing reasonable people to differ as to the result, judgment on the evidence is improper"); *Teitge v. Remy Const. Co. Inc.*, 526 N.E.2d 1008, 1010 (Ind. App. Ct. 1988) (recognizing that a Rule 50(A) judgment the evidence "is proper only where there is a lack of evidence of probative value upon one or more of the factual issues necessary to support a verdict, and no reasonable inference in favor of the plaintiff can be drawn from this evidence").

Importantly, the same evidence used to defeat a summary judgment motion under Trial Rule 56(C) may be insufficient to overcome a motion for a directed verdict. *See, e.g.*, *Think Tank Software Dev. Corp. v. Chester, Inc.*, 30 N.E.3d 738, 745-46 (Ind. Ct. App. 2015) (rejecting the non-moving party's argument that—in defeating the defendant's pre-trial summary judgment motion—it has also *automatically* defeated a motion for directed verdict), *trans. denied*.

In *Think Tank*, the trial court had previously determined (in a ruling that was affirmed on appeal) that there was enough designated evidence of the existence of trade secrets to require the claim to go to the jury. *Id. Id.* at 745 (citing the prior unpublished appeal). Specifically, the prior summary judgment court concluded that the designated evidence shows there is a genuine issue of material fact that prevents the grant of summary judgment on the trade secrets issue and that "[t]he fact finder must determine whether the items contained in the confidentiality clause are trade secrets that may be protected." *Id.*

Fast-forward to after the plaintiff closed its case-in-chief at trial, the defendant filed a Rule 50(A) motion. *Id.* In an effort to defeat that motion, the plaintiff argued that—under the law-of-the-case doctrine—the summary judgment ruling precluded the trial court from determining that the plaintiff had not presented enough evidence to survive the defendant's motion for directed verdict (now, judgment on the evidence). *Id.* Put differently, the plaintiff argued that the evidence required to defeat a Rule 56 motion for summary judgment and a Rule 50(A) motion for

directed verdict is the same, because those standards of review are essentially the same. *Id.*

The *Think Tank* Court rightly disagreed, holding that the plaintiff—at trial—had "failed to produce enough evidence to allow a reasonable fact finder to determine that the proffered information was trade secrets" (i.e., information not generally known or ascertainable to the public). *Id.* at 746. In so holding, the *Think Tank* Court did not weigh testimony or judge witness credibility. Id. at 745-46.

As recognized by *Purcell* and its long line of "flowing down" case precedents, the crux of the qualitative failure analysis under Trial Rule 50(A) is whether the inference the burdened party's allegations are true may be drawn without undue speculation. *Purcell*, 972 N.E.2d at 841-42 (*quoting Dettman v. Sumner*, 474 N.E.2d 100, 105 (Ind. Ct. App. 1985)).

In navigating this Rule 50(A) sufficiency (reasonable) standard, the trial court must view the evidence in a light most favorable to the non-moving party. *Cavens v. Zaberdac*, 849 N.E.2d 526, 529 (Ind. 2006). The Court may not substitute its judgment for that of the jury on questions of fact. *Kimbrough v. Anderson*, 55 N.E.3d 325, 336 (Ind. Ct. App. 2016), *trans. denied*. Nor should a motion for judgment on the evidence be granted because the evidence preponderates in favor of the moving party. *Id.* Rather the trial court determines only: (a) whether there exists any reasonable evidence supporting the claim; and (b) if such evidence does exist, whether the inference supporting the claim can be drawn without undue

speculation. *Id.*; *see also Faulk v. Nw. Radiologists, P.C.,* 751 N.E.2d 233, 238 (Ind. Ct. App. 2001) (citing *Campbell v. El Dee Apartments,* 701 N.E.2d 616, 619 (Ind. Ct. App. 1998)), *trans. denied*.

Additionally, where there is a conflict in testimony or other evidence, the trial court should not weigh evidence or judge the credibility of witnesses in deciding a Rule 50(A) motion. *Purcell*, 972 N.E.2d at 842; *Drendall Law Office, P.C. v. Mundia*, 136 N.E.3d 293, 304 (Ind. Ct. App. 2019), *trans. denied.* The court should not substitute its judgment for that of the jury on a question of fact and it should not grant a motion simply because the evidence favors the moving party. *Kimbrough*, 55 N.E.3d at 336.

In short, a Rule 50(A) judgment on the evidence should be granted only where the probative evidence is without conflict, the challenged claim or defense is based upon speculation or conjecture as opposed to sufficiently substantial and probative evidence, or the evidence is susceptible to only one inference that supports judgment for the moving party. *Drendall L. Off., P.C.*, 136 N.E.3d at 304.

If, by contrast, there is any *probative* evidence or reasonable inference, or evidence allowing reasonable people to differ or reach different conclusions regarding the evidence, then judgment on the evidence should be denied. *Purcell*, 972 N.E.2d at 840-42

These rules (which were acknowledged by the *Purcell* Court) are in place to guarantee a litigant's right to have conflicting evidence resolved by the jury. They

remain sufficient to protect Indiana's citizens and the integrity of the legal system. This Court should reaffirm the *Purcell* two-tiered quantitative-qualitative test governing Trial Rule 50(A) motions.

III.C. The Abuse-of-Discretion Appellate Standard of Review

This Court should also reaffirm the existing appellate standard of review for Indiana Trial Rule 50(A) orders. In that vein, the grant or denial of a motion for judgment on the evidence is within the trial court's broad discretion and will be reversed only for an abuse of that discretion. *Id.* at 463.

In reviewing a trial court's ruling on a motion for judgment on the evidence, this Court is bound by the same standard as the trial court. *Kimbrough*, 55 N.E.3d at 336. Upon appellate review of a trial court's ruling on such a motion, the reviewing court must consider only the evidence and reasonable inferences most favorable to the nonmoving party. *Belork v. Latimer*, 54 N.E.3d 388, 394-95 (Ind. Ct. App. 2016) (*on reh'g*).

The Appellate Court does not weigh evidence or judge witness credibility. To the contrary, under Trial Rule 50(A), the Appellate Court examines the evidence most favorable to the nonmoving party and determines whether the trial judge correctly applied the two-tiered quantitative-qualitative test. *See Lambert v. Yellowbird, Inc.*, 498 N.E.2d 80, 81 (Ind. Ct. App. 1986), *trans. denied*; *Dettman*, 474 N.E.2d at 105.

This appellate standard has been consistently employed in the review of Trial Rule 50(A) rulings, is predictable, and has worked well in Indiana. It should be reaffirmed by this Court.

IV. CONCLUSION

Amicus Curiae Defense Trial Counsel of Indiana respectfully requests that this Court reaffirm both the *Purcell* standard governing trial court decisions under Indiana Trial Rule 50(A) and the associated "abuse of discretion" appellate standard of review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH APPELLATE RULE 44(E)

I verify that this brief complies with the type volume limitation of Appellate Rule 44(E). The brief does not exceed 4,200 words. The brief contains 3,762 words (including those used in footnotes) based upon the count of the word processing system used to prepare the brief, Microsoft Word 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that this Amicus Brief was electronically filed with the Clerk of the Indiana Court of Appeals, Supreme Court, and Tax Court on this 16th day of November, 2023, and served—via the Court's E-Filing System—on:

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